No. 80-148

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Are the Fourth and Fourteenth Amendments violated by warrantless searches of sealed packages closed against inspection when such property has been immobilized during a highway stop and arrest?

2. What constitutional limits apply when inferences drawn from the appearance of a package are used to avoid the Warrant Requirement?

3. When this Court settles a search and seizure dispute by vacating a state court judgment and mandating the state court to reconsider its judgment, does the mandate authorize the state court to reinstate its judgment on previously unraised federal grounds which are outside the premises of the case reviewed by this Court and which could have been but were not presented for review?

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on April 30, 1980, denying a petition for hearing, are reproduced in the appendix to the petition for a writ of certiorari filed herein on

July 29, 1980.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 90 days of April 30, 1980.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

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[1] The following designations have been used in this brief: J.A. (Joint Appendix); R. (Reporter's Transcript on Appeal).

THE STOP

On January 5, 1975 at 1:45 a.m., while traveling along Interstate 80 in the foggy and very cold morning hours, Officer DePue of the California Highway Patrol observed petitioner's stationwagon, between one tenth and one quarter mile distant, traveling on Nelson Road. (J.A. 6, 7, 55, 56, 64; R. 65:6-9)

Despite the difficult viewing conditions, which limited visibility to one quarter of a mile, Officer DePue formed an opinion that petitioner was driving too slowly. (J.A. 57) It was later established that this opinion was mistaken and based upon DePue's mistaken belief that the speed limit on Nelson Road was much higher than it actually was. (R. 202:13-28, 229:26-239:9, 240:5-241:19)

Viewing the distant scene in this false light, DePue likewise believed he observed petitioner twice cross over the broken

yellow road line, once three feet and once a full vehicle width. (R. 6:9-16, 7:24-8:4) DePue, however, never testified that his limited view of the distant scene allowed him to determine whether these alleged maneuvers were in violation of law.

Upon exiting the freeway, Officer DePue and his partner, Officer Stoltz, stopped petitioner to question him about his driving. Since the road did not have a shoulder, petitioner's vehicle was stopped in the middle of the right hand roadway. (R. 75:8-19)

Petitioner stepped out of his station-wagon and produced his driver's license. (J.A. 61-62) Asked to produce a registration, petitioner returned to his car and proceeded to look for the registration. (J.A. 62) While the door was opened, Officer DePue detected the odor of burned marijuana. (J.A. 64-65) Immediately upon receiving petitioner's registration, DePue

arrested petitioner for driving under the influence of marijuana. (J.A. 63, 65, 81)

THE AUTOMOBILE SEARCH

A search of the passenger compartment then followed. Several entries were made into the vehicle which yielded evidence to support the basis for the arrest: two pairs of tweezers, one with a hand-rolled cigarette butt, and a cookie tin containing cigarette papers and approximately 1/8th oz. of marijuana. (J.A. 42, 66-67, 76-77)

While this search took place Robbins was kept spread-eagle against his still running car, breathing in the fumes from its exhaust. (J.A. 12, 65, R. 80:17-18) At some point he was overcome by these fumes and fell into the middle of the oncoming roadway, where he vomited. (J.A. 68-69)

Still standing outside in what Officer DePue described as a very cold night,

Robbins was swallowing rapidly and perspiring profusely. (J.A. 71) He began saying irrational things and looked wild-eyed. (J.A. 72-73) He was then handcuffed, and while DePue continued the search, Stoltz questioned petitioner in order to complete a lengthy vehicle impoundment form. (J.A. 18, 35, 71-73) Shortly thereafter, and after Robbins learned of the search of the cookie tin, Robbins allegedly stated to Sergeant Stoltz, "What you are looking for is in the back." (J.A. 74, R. 120:23-25) Robbins was then removed from the cold and placed in the patrol vehicle. (R. 50:8-12)

THE LUGGAGE SEARCH

Removing the keys from the petitioner's ignition, DePue unlocked and opened the tailgate of the wagon. (R. 50:13-15) Picking up the floor rug, DePue discovered a luggage compartment under the floor in the rear deck of the wagon. (J.A. 38-39) Pulling a handle set flush into the deck,

DePue opened the luggage compartment and observed therein two pieces of luggage (a tote bag and a briefcase) and two sealed packages. (J.A. 38-40)

Ignoring the packages, DePue opened up a brown leather tote bag and discovered a masonry jar and three white plastic bags, each of which was double taped. (R. 133: 6-7) After they were opened these items were found to contain a total amount of marijuana in excess of one pound. (J.A. 42)

DePue next removed and opened a brown leather briefcase and rummaged through petitioner's clothing. (J.A. 22-23, R. 54:28-55:9) DePue then removed a package wrapped in opaque green plastic and sealed closed. (J.A. 23, R. 57:20-17)

The package was rectagular in shape and entirely plain, bearing no legend or any other written indicia supporting inferences concerning its contents. As Justice

Rattigan of the Court of Appeal said of a photograph of the package in the record:

> The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any other wholly innocuous items which might be heavy in weight. (Dissenting opinion of Justice Rattigan, p. A-11 of Petition for Writ of Certiorari)

Upon opening this package DePue discovered a block of marijuana weighing approximately fifteen pounds. (J.A. 42) Finally, DePue removed and opened a similar package containing approximately the same amount of marijuana. (Id.)

THE PROCEEDINGS IN THE TRIAL COURT

Petitioner was charged with counts of possession of marijuana, possession of marijuana for sale, transportation of marijuana, and driving under the influence of a drug.

On January 14, 1975, during the preliminary hearing in the municipal court, petitioner's counsel orally objected to the introduction into evidence of all articles taken during the warrantless search of the trunk. (J.A. 44-45) The court reserved counsel's objection but permitted the items to be received in evidence. (J.A. 45-46)

At the preliminary hearing the District Attorney elicited from DePue a statement that he had heard that contraband is sometimes packaged the way the two parcels were packaged. DePue, however, said he hadn't seen this himself (in all of his eight years with the Highway Patrol) and discredited this information as "merely hearsay." (J.A. 41, 83)

On March 24, 1976 petitioner's motion to suppress all tangible evidence as obtained in violation of petitioner's constitutional rights came on for hearing (based upon the

preliminary hearing transcript) and was denied. (J.A. 51-112)

Petitioner was convicted of possession of marijuana, possession for sale, and transportation of marijuana, but found not guilty of driving under the influence of a drug. Petitioner was sentenced to prison for a term of five years to life and has been released on bail pending Supreme Court review after serving a portion of this sentence.

PROCEEDINGS IN THE APPELLATE COURT AND THIS COURT

On May 9, 1978 the Court of Appeal, First Appellate District, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. The court upheld the warrantless search of the luggage and sealed packages in the luggage compartment as "falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion, at iv, app.,

Petition For A Writ of Certiorari, Robbins v. State of California, No. 78-567) No other grounds were relied upon.

On June 25, 1979, this Court granted a petition for a writ of certiorari, ordered the judgment of the Court of Appeal to be vacated, and remanded the case to the Court of Appeal for further consideration in light of Arkansas v. Sanders, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 259.

On remand, the California Attorney General conceded that the warrantless searches of the tote bag and cookie tin were in violation of the Fourth Amendment.

On March 4, 1980, two members of the Court of Appeal, over the dissent of Justice Rattigan, ruled that the mandate of this Court did not require the suppression of the sealed plastic packages on the ground that "the packages did not support a reasonable expectation of privacy." (Opinion, at A-6, Petition)

On April 30, 1980, over the dissent of Chief Justice Bird and Justice Tobriner, the California Supreme Court voted to deny a petition for hearing.

SUMMARY OF ARGUMENT

Under any Fourth Amendment test the search of the plain securely wrapped and sealed packages in this case required a warrant. For over a hundred years it has been recognized that Fourth Amendment protection extend to searches of "[l]etters and sealed packages of this kind . . . . closed against inspection wherever they may be." Ex parte Jackson, 96 U.S. 727, 733. Any other result under the facts of this case would legitimize warrantless searches of packages, wherever found, of almost any size and shape wrapped in almost any common material upon no more than probable cause inferences. Nonetheless, the mistake below and the perplexing array

of lower court decisions which have attempted to deal with searches of this type point to a need for the pronouncement of the rule which clearly marks the line where a warrant is required.

The Court of Appeal's decision turned on its interpretation of the "reasonable expectation of privacy" formulation which originated in Katz v. United States, 389 U.S. 347 (1967) as well as its interpretation of dicta in footnote 13 of Arkansas v. Sanders, 442 U.S. 753 (1979), which states that "containers which by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance" do not receive the protection of the warrant clause.

Until these highly subjective tests are explained or limited, they threaten to eclipse the most basic Fourth Amendment principles: the principle that in the

ordinary case inferences are to be drawn by the magistrate and not the police, the principle that in the ordinary case searches of private property must be performed pursuant to a warrant, and the principle that in the ordinary case, no amount of probable cause, standing alone, is sufficient to justify a warrantless search.

Requiring an evaluation of societal norms and the intensity of personal mental states, the "reasonable expectation of privacy" test fails to draw the line at which a warrant is required. The formulation, however, was never intended to assume this role. The formulation, instead, originated from an attempt to determine whether a "search and seizure" had occurred in the novel situation presented in Katz v. United States, supra. Where it is undisputed that a search and seizure has occurred, and no exigent circumstances or other recognized exceptions to the warrant

clause apply, reference to the language of the Fourth Amendment itself provides a rule which is both inexorable and clear: a search requires a warrant.

Assuming, arguendo, that the police could and did infer that the packages in this case contained bricks of marijuana does not take the case out of the rule. If the contents of the packages were in plain view (or tantamount to being in plain view) there would be no search and the warrant requirement would be deemed waived. But if, on the other hand, the contents of the packages are totally hidden from the senses, unless an exception applies, inferences which rise no higher than probable cause must be weighed by a neutral magistrate. No amount of probable cause standing alone can justify a warrantless search.

Finally, these issues appear in this Court only now nearly two years after this

case was disposed of on the premise that the contents of the packages were neither in plain view nor tantamount to being in plain view. No such contentions were made in the California Court of Appeal prior to this Court's prior disposition. Petitioner submits this should settle that issue forever. Any other result undermines the review processes of this Court.

ARGUMENT

I

ABSENT EXIGENT CIRCUMSTANCES OR SOME OTHER RECOGNIZED EXCEPTION TO THE WARRANT CLAUSE, A SEARCH AND SEIZURE REQUIRES A WARRANT

A. The Securely Wrapped Packages

The California Court of Appeal held that two securely wrapped packages "could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment."

Justice Rattigan's dissenting opinion provides a vividly accurate description of the appearance of these packages. His description is based upon a photograph contained in the trial record which the Court of Appeal majority also rely upon:

> The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type [sic] plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.
>
> The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an un-

> labelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile." (Dissenting Opinion, at A-10 and A-11, app., Petition For Writ of Certiorari)

Although the California Court of Appeal majority does not suggest that Justice Rattigan's visual description is not fully accurate, it nevertheless sees the packages with entirely different thoughts in mind:

> . . . Officer DePue described the packages as "green, wrapped plastic blocks" and testified that he had heard that contraband was commonly packaged in this way . . . the bulky tape-secured packages do not present an appearance of containing anything other than contraband. The court could reasonably conclude that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents.
>
> . . . Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not <u>commonly</u> packaged in this manner . . . . Any experienced observer could have inferred from

the appearance of the packages that they contained bricks of marijuana. (Opinion, at A-4-A-6, supra)

B. Discerning The Contours Of The Court of Appeal's Decision That The Packages Could Not Support A Reasonable Expectation Of Privacy

The scope of the California Court of Appeal decision can best be understood by keeping the following facts in mind:

1. The record decisively refutes any contention that the arresting officer thought the packages were bricks of marijuana and was attracted to them. According to DePue, when he opened up the luggage compartment, he saw the packages lying side by side with the luggage items. Nevertheless, DePue's attention was not attracted to the packages until after he had removed and thoroughly searched every other item in the luggage compartment.

2. The trial court never concluded that the contents of the packages could have been inferred "from their outward appearance." This issue was never raised in the trial court. The Court of Appeal itself raised this issue for the first time after this Court's June 25, 1979 reversal of its judgment.

3. The sole basis in the record for the Court of Appeal's raising the issue on remand was Officer DePue's reply to a leading question where he indicates that he had heard that contraband (not bricks of marijuana) is normally packaged in the way that the two parcels were packaged. However, he himself discredited this information as "merely hearsay" because he had "never seen them before" in all of his eight years with the California Highway Patrol.

4. The arresting officer did not state that the hearsay information came from a

reliable source, and since he ignored the packages when he first saw them he could not have said that he relied upon the hearsay.

5. There is likewise nothing in the record to suggest that the particular wrapping employed in this case (i.e., green plastic) is the only way contraband may normally be wrapped. Indeed, in Filitti v. Superior Court, supra, the police officer testified that blocks of marijuana are often wrapped in butcher paper. 23 C.A.3d 930, 932 (1972) Likewise, in United States v. Stevie, 582 F.2d 1175 at 1179, n. 4 (1978), it was noted that burlap bags are also customarily used to ship marijuana. Counsel are likewise informed that bricks of marijuana are also often wrapped in other common wrapping materials.

6. Even assuming, arguendo, that contraband is normally packaged in plastic, butcher paper, burlap or any other common

material, this does not suggest what portion of packages using such materials contain contraband. Thus, for example, in People v. Suennen, 114 C.A.3d 192 (1980), there was hearsay evidence that burglars commonly use pillowcases, but no suggestion that most pillowcases contain stolen goods. As far as the record in this case is concerned, in view of the widespread use of plastic, butcher paper, and burlap in packaging, the amount of contraband carried in such packaging may be (and probably is) miniscule compared to the amount of legal goods. The common use of such materials for contraband may be mostly due to their universal availability, thereby providing a package indistinguishable from the millions of other parcels wrapped in the same nondescript manner.

7. There is nothing in the record to suggest that the size or shape of the parcels was in any way remarkable. A brick

of marijuana can be of any size or shape, but most commonly a brick means a kilogram (i.e., 2.2 lbs.) of marijuana. Thus, in Filitti v. Superior Court, 23 C.A.3d 930, 932, 935 (1972), the brick of marijuana weighed one kilogram and was contained within a 7" x 10" package. Since each of the parcels in this case weighed approximately fifteen pounds, this would suggest that they were seven to eight times the size of the parcel involved in Filetti v. Superior Court, supra.

8. There is also nothing in the Court of Appeal's decision to suggest that its holding regarding packages of this type is limited to automobiles. This follows from the Court's holding in Arkansas v. Sanders, that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S. 752, 765, n. 13; 61 L.Ed.2d 235, 245.

Thus the California Court of Appeal could be expected to reach the same result for the search of a parcel of almost any size or weight which is tightly wrapped for shipment in almost any common wrapping material.

C. How Intensely Personal Must An Expectation Of Privacy Be For A Warrant To Be Required?

There is no basis for a conclusion that the securely wrapped packages in this case did not support a reasonable expectation of privacy. Nonetheless, the California Court of Appeal's conclusion to the contrary, as well as its inference-reaching process, points out the highly subjective and unreliable nature of the "reasonable expectation of privacy" rule. As is evident from the perplexing array of lower court opinions on the subject, the test is capable of reaching any desired result.

People v. Dalton, 24 C.3d 850 (1979) (reasonable expectation of privacy in metal tool box and leather box with "Longine" inscription); People v. Musante, 102 C.A.3d 156 (reasonable expectation of privacy in electric blanket box); United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979) (reasonable expectation of privacy in plain cardboard boxes sealed with tape); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (no reasonable expectation of privacy in closed cardboard box); People v. Diaz, 101 C.A.3d 440 (1980) (no reasonable expectation of privacy in closed soft drink container or lunchbox); People v. Pace, 92 C.A.3d 199 (1979) (reasonable expectation of privacy in a lunchbox); People v. Suennen, 114 C.A.3d 192 (1980) (no reasonable expectation of privacy in personal effects carried in a pillowcase); United States v. Rivera, 486 F.Supp. 1025, 1029-1034 (1980) (reasonable expectation of

privacy in marijuana contents of large black polyethelene garbage bags which were sealed)[2]; United States v. Gooch, 603 F.2d 122, 126-127, (1979) (no reaconsble expectation of privacy in large plastic sacks since Sanders does not apply to "mere cargo"); United States v. Sanders, 631 F.2d 1309, 1321 (8th Cir. 1980) (warrant not required for search of heavy manila envelope of the type used to carry stamps, coins, watches, etc.); United States v. Honigman, 633 F.2d 1337 (1980) (no reasonable expectation of privacy where contents were inside an opaque paper bag which was itself inside a shopping bag).

This Court cannot provide order in this area of law by simply classifying the differing varieties of containers. The types of containers in which objects may be car-

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[2] Note that the packages in the instant case were not wrapped in garbage bags, as in United States v. Rivera, supra, but were wrapped in heavy duty plastic similar to a type used in commercial packaging.

ried are potentially infinite. As Justice Blackmun states:

> [S]uppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, and duffel bag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? 442 U.S. at 772; 61 L.Ed.2d at 250.

The State of California accepts Justice Blackmun's characterization of the issue. According to the California Attorney General, in each case the officer in the field must ask the following question: whether the person has " an expectation of privacy in the packages in his car so intense that police [are] constitutionally required to secure a warrant before examining them?" (Opposition to Petition for Writ of Certiorari, at i).

Does such a question provide any guidance at all to the policeman in the field?

At what point on the gradient scale of "personal" does one find the mark of the warrant clause? When the expectation of privacy reaches .2 on a scale of 1? When it reaches halfway up the scale? When it reaches .95 of a scale of 1?

As Professor Amsterdam cautions, reducing the policies of the Fourth Amendment to

> . . . a general sliding scale approach could only produce more slide than scale . . . what it means in practice is that appellate courts defer to trial courts and trial courts defer to police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 393 (1974).

D. The Normal Repositories For Personal Effects Approach

It only confuses matters to suggest, as the State of California does, that the Fourth Amendment's protection of containers

be limited to those "normally . . . intended to 'serve as repositories for personal items'." (Opposition to Petition for Writ of Certiorari, at 11).

According to Webster's New World Dictionary, a repository is:

> a box, chest, closet, or room in which things may be placed for safekeeping.

By this definition, a repository would appear to be a container which is used for a more permanent type of storage and safekeeping. Arguably, luggage would not fall within this class. Boxes for storage would fall within the class but not boxes for shipment or the mails. Faced with this definition problem, the Attorney General might offer to enlarge the class to include temporary repositories for transportation.

Nonetheless, the concept of repository does not have roots in the Fourth Amendment notions of privacy. The function of

a repository is safekeeping, not privacy. A museum might be deemed a repository of art works despite the fact that the works are on public display. On the other hand, a manila folder with written material inside it might not be deemed a repository, despite the fact that it serves to protect the written material from unwanted eyes. Thus what really counts for purposes of Fourth Amendment privacy analysis is not whether a container is a repository, but whether it protects its contents from unwanted eyes.

The proposed rule also cannot define what containers are "normally intended" to serve as repositories of personal effects. What does it mean to say that a particular container is "normally intended" to serve as a storage or transportation repository for personal effects? Who is the person who is intending? What use of a particular container is "normal?" A shoe box normally

carries shoes, but can be used to carry any small personal effect. Which of these uses is normal? A pillowcase normally does not carry anything but is known to be used by the less affluent as a container to carry personal clothing and other laundry to a laundry room. Would this be deemed a normal or abnormal use? See also People v. Suennen, 114 C.A.3d 192 (1980) (pillowcases commonly used by burglars).

Personal items can be and sometimes are carried in a bag. The most common use of the paper bag or shopping bag is its use to carry grocery goods and merchandise. Sometimes such items are personal. A paper bag or shopping bag can also be and is sometimes used to carry other types of personal effects when other types of containers are unavailable. Which of these uses would be deemed normal?

Consider the situation of a man walking through a high crime area. If he carries

his personal effects in an expensive briefcase, he runs the risk of attracting unwanted attention, so he carries his personal items in a Macy's shopping bag. Is this use normal?

A fishing tackle box normally carries fishing tackle, but functions as a repository for jewelry, private papers or important documents. Are not all of these uses normal?

Thus in United States v. Rivera, 486 F.Supp. 1025 (N.D. Tex.), where the court held that there was a reasonable expectation of privacy in the contents of sealed plastic bags of the type ordinarily used for garbage, the court said:

> . . . Here, of course, we are not dealing with a usual type of luggage or duffel bag—a common repository of personal effects. But the question must answer itself. One man's garbage is another man's luggage. There may well be cases where the containers themselves fail the objective test. But when a container has the quality of preserving privacy and its use is

> not so "unusual" as to put the government on notice of a particular privacy interest, that its usage is unusual does not deny a privacy interest. That approach could take us down a path of categorizing containers. Otherwise stated, the usage is not so alien to custom that measured by objective standards, no right to privacy is reasonable. We do not have a case where there is a subjective interest so farfetched that government cannot be required to anticipate a reasonable claim of privacy. Id. at 1034.

According to Webster's New World Dictionary, "normal" means:

> conforming with or constituting an accepted standard, model, or pattern; especially, corresponding to the median or average of a large group in type, appearance, achievement, function, development, etc., natural, standard, regular.

Thus, by the primary definition the "normal repositories" rule would seem to protect only "repositories for personal effects" which conform to "accepted standards." But where are these accepted standards to be found? Morality does not govern here. People do not raise their

eyebrows at the sight of an abnormal repository of personal effects. If anything, the greatest intensity of desire for privacy inspires the most unusual repositories. Thus, people may hide their personal wealth in the ground, in a mattress, or underneath a plank in a staircase.

If it can be said that there is any community-wide standard, that standard leaves each man total freedom of choice. Thus any container which functions to keep out prying eyes would be deemed normal.

Unwilling to accept this plain truth, the State of California might urge that it has a different definition of normal in mind, an approach which would limit Fourth Amendment protection to those containers which are most common. But how would such an approach be carried out? It would seem to require a statistical survey of a large cross-section of people, asking each what type of repositories they use for their

personal effects. The most common response would be "the normal repository of personal effects."

Obviously, however, it would be absurd for the Fourth Amendment to protect only one type of repository for personal effects. It would therefore be expected that the proponent of the rule would offer to protect not only the most common type of repository, but also the most common types of repositories.

But how common must a repository be to fall within the proposed rule? Would only the top five repositories be protected? Or on the the top ten? The top forty? Who would decide these questions?

In any case, what constitutional foundation do such distinctions have? Is it to be argued that the Fourth Amendment frowns upon the man who chooses an unusual repository for his personal effects? Is it to be argued that the man who can afford an

expensive set of luggage receives greater Fourth Amendment protection than the man who transports his personal effects in a less privileged but no less private fashion?

E. In Katz v. United States, The Reasonable Expectation Of Privacy Analysis Simply Established That A Search And Seizure Had Occurred

This is not to deny the fundamental truth of the "reasonable expectation of privacy" formulation in Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347 (1967). The term now seems to have been adopted by this Court despite the fact that it was not used in the opinion for the court in Katz. See Smith v. Maryland, 442 U.S. 735 (1979). Justice Harlan's formulation of ultimate Fourth Amendment principle still remains so clear that it can neither be proved nor contradicted unless by a proposition still clearer. Nonetheless, the term was not offered by Justice Harlan as a ru-

bric for policemen in the field.

The issue in Katz v. United States, supra, was whether or not electronic surveillance of a phone booth was a "search and seizure" within the meaning of the Fourth Amendment. If there was a search and seizure, a warrant would be required. If there was no search and seizure, no warrant would be required.

The question was novel since electronic eavesdropping involved no physical penetration of the phone booth, thus no search and seizure in the traditional sense of Goldman v. United States, 316 U.S. 129, which said that a trespass was required. The Court was therefore called upon to consider what ultimate Fourth Amendment principle stood behind the warrant clause.

The Court declared that a person in a telephone booth may rely upon the protection of the Fourth Amendment as to matters he reasonably seeks to preserve as private:

> . . . [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. Id. at 352 [Citations omitted].

The Court therefore held that the electronic eavesdropping constituted a "search and seizure":

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and Seizure" within the meaning of the Fourth Amendment. Id. at 353.

Justice Harlan's concurring opinion no more than attempts to explain the opinion of the court. He notes that:

> Silverman v. United States . . . established that interception of

> conversations intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required . . . In Silverman we found it unnecessary to reexamine Goldman v. United States, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree it should now be overruled. Its limit on the Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion. 389 U.S. at 361-62.

Smith v. Maryland, 442 U.S. 735 (1979) also follows Katz v. United States, supra. In that case this Court held that a telephone pen register did not involve a "search and seizure" since there was no violation of a reasonable expectation of privacy.

In this case, by contrast, it is undisputed that there was both a seizure and a search. The seizure occurred when the

packages were taken from the luggage compartment. The search occurred when the securely wrapped packages were untaped, unwrapped, and opened. Since that case does not fall within any of the narrow exceptions to the warrant clause, a warrant was required.

F. Absent Exigent Circumstances Or Some Other Warrant Clause Exception, A Search And Seizure Requires A Warrant

The fact that the reasonable expectation of privacy principle stands behind the Fourth Amendment as an ultimate constitutional fountainhead does not necessarily mean that it can serve as a yardstick to be daily used by the policeman in the field. This Court looks to ultimate principle to understand rules and fashion new ones. But such principles are not necessarily rules themselves. This Court does not simply tell its Clerk of the Court to grant due process to all petitioners. The Court in-

stead looks to due process and fashions rules which accord with its principle. In the same way, the "reasonable expectation of privacy" principle is not a rule for the policeman in the field. The principle offers inspiration and is food for thought, but itself draws no clear lines.

Turning this truth into a rubric would do much more harm than good. If convictions are to be upheld under the exclusionary rule the police need Fourth Amendment rules which are starkly clear and draw razor sharp lines. No guidance is offered by a rule which requires an evaluation of societal norms and an estimate of the intensity of personal mental states. Such a rule fails to offer any advice at all on the ultimate question: the point at which the warrant is required.

As Katz v. United States, supra, and Smith v. Maryland, supra, implicitly declare, the Fourth Amendment itself draws

this line. Governmental intrusions which constitute "searches and seizures" call into play the Fourth Amendment. Absent exigent circumstances or some other recognized exception to the warrant clause, a search requires a warrant.

The "reasonable expectation of privacy" analysis itself reaches this result. "That expectation is, simply put, what citizens may properly expect of government." United States v. Rivera, 486 F.Supp. 1025, 1030 (N.D. Tex. 1980). As the Rivera court said of the "test":

> While the court confesses difficulty in applying this "test," it appears that the inquiry is actually whether there is a right to be free of government intrusion without a warrant when articles have been so placed. Id. at 1034.

As this Court held in United States v. Chadwick, for over a hundred years it has been recognized that the Fourth Amendment guarantees extend to

> [l]etters and sealed packages . . . closed against inspection

wherever they may be. Ex parte Jackson, 96 U.S. 727, 733 (1878); United States v. Chadwick, 433 U.S. 1, 10.

II

"NO AMOUNT OF PROBABLE CAUSE CAN JUSTIFY A WARRANTLESS SEARCH OR SEIZURE ABSENT 'EXIGENT CIRCUMSTANCES.'" COOLIDGE v. NEW HAMPSHIRE

The essence of the opinion below is that the particular packages opened by the police without a warrant strongly suggested to an experienced observer by their appearance that they contained bricks of marijuana. The majority below was of the opinion that since "legally possessable objects are not commonly packaged in this manner" the packages were not entitled to "a reasonable expectation of privacy" and thus were not protected by the Fourth Amendment.

As petitioner has earlier noted, the record does not contain factual support for the Court of Appeal's conclusions. Supra,

at pp. 16-19. Officer DePue ignored the packages when he first saw them and never said he thought they contained bricks of marijuana.

Even assuming arguendo that Officer DePue had inferred from the appearance of the packages that they might contain marijuana, however, would not justify a warrantless search. The California Court of Appeal's contrary conclusion confuses the issue of whether there was a Fourth Amendment "search" with the probable cause standard for a search.

Reference to the "reasonable expectation of privacy" principle articulated in Katz v. United States, 389 U.S. 347 (1967) or the "legitimate expectation of privacy" principle used by this Court in United States v. Chadwick, 433 U.S. 1 (1977) may assist a determination of whether a Fourth Amendment "search and seizure" has occurred. But whatever the formulation, it certainly

must be conceded that under the prior decisions of this Court, no matter how much probable cause there is that a particular container contains contraband, the requirement of a judicial warrant before the police open a sealed container is still applicable. As this Court said in Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> [N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Id. at 468.

This rule even applies when contraband inside premises is plainly seen by police who are outside:

> Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rules that the police may not enter a make a warrantless search. Id. at 468.

These same rules apply to searches of packages legally seized. Thus in Arkansas v. Sanders, supra, the police had reliable

information that checked out perfectly that a particular suitcase of a described color contained marijuana. In United States v. Chadwick, supra, the footlocker was leaking talcum powder, a substance often used to mask the odor of marijuana, and a trained dog signaled the presence of a controlled substance inside. Nevertheless, warrants were required for both of these searches because of the constitutional preference for warrants absent exigent circumstances. Justice Powell, writing for the court in Arkansas v. Sanders, supra, stated:

> The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.
> 442 U.S. 753, 758, 61 L.Ed.2d 235, 241.

Justice Powell also pointed out that our nation has made a basic constitutional choice that individual freedoms are best protected through a separation of govern-

mental powers among the different branches and levels of government so that, in the case of searches of a person's papers, houses and effects, it is the executive branch which will perform the search but it must normally be authorized by the judicial branch, namely a neutral and detached magistrate not engaged in the often competetive enterprise of ferreting out crime. Id.

The California Court of Appeal claims that its contrary view is supported by dicta in a footnote to this Court's opinion in Arkansas v. Sanders, supra. We quote that footnote now:

> Not all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a

> warrant. See Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968) (per curium). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile. 442 U.S. at 764-765, n. 13.

Relying upon this footnote, two members of the California Court of Appeal held that a warrantless search was permissible since the contents of the packages allegedly could be inferred from their outward appearances.

The Court of Appeal's reading of this footnote is totally unjustified. The footnote describes two classes of containers, but neither of these classes has even remote application to the securely wrapped packages in this case.

A. Containers The Contents Of Which Are In Plain View

When the contents of a seized container are in "plain view" there is no reasonable expectation of privacy and thus no search occurs. See Harris v. United States, 390 U.S. 234, 236 (1968). But the plain view of packages and the strong belief that they contain evidence of a crime or contraband do not authorize a warrantless, general exploratory search. United States v. Chadwick, 443 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Turk, 526 F.2d 654 (5th Cir. 1976); United States v. Hunt, 366 F.Supp. 172 (N.D. Tex 1973). See also Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); Taylor v. United States, 286 U.S. 1 (1932); Steele v. United States, 267 U.S. 498 (1925); Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L.Rev. 1047 (1975); LaFave, A Treatise on the Fourth Amendment, Vol. 2,

§§ 7.5(b) and (d). Thus the plain view exception does not apply to this case.

B. Containers Which By Their Very Nature Cannot Support Any Reasonable Expectation of Privacy

The other class of containers mentioned in footnote 13 are "containers (which) . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Note that this is a two-fold requirement:

1. the container must be of the type which by its very nature cannot support any reasonable expectation of privacy;
2. the contents can be inferred from the outward appearance of the container.

The footnote in Sanders does not clearly specify how much room for doubt the inference process can leave. Presumably, how-

ever, since the Court is describing a container which "by [its] very nature cannot support any reasonable expectation of privacy," the Court has in mind a situation where the contents are tantamount to being in plain view. Where, on the other hand, the nature of a package simply permits suspicions and inferences rising no higher than probable cause, "[t]he point of the Fourth Amendment . . . is . . . that those inferences are to be drawn by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 13-14 (1948). No amount of probable cause standing alone can justify a warrantless seizure. Coolidge v. New Hampshire, 403 U.S. 443, 468.

Footnote 13 in Arkansas v. Sanders gives examples, "a kit of burglar tools or a gun case."[3] Added to this list might be a li-

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[3] The Court's footnote examples have created some confusion in the lower courts and need clarification. As to self-identifying containers such as a gun case, it could well be said that a warrantless

quor bottle or a beer can in a car or a public place, boxes containing legends on their wrappers stating "live machine gun ammunition" or "fireworks" (where their possession is illegal) and boxes identifying the contents as restricted drugs. These may be called "self-identifying" containers. As to such containers, it could well be said that one who chooses to carry material he wants private in such a container has waived his right to privacy by a container which, under certain circumstances, provides so open an invitation to police inspection.

The securely wrapped packages in this case do not qualify as self-identifying.

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3 (cont.)

search would be authorized under the exigent circumstances. As to the kit of burglar tools, we must agree with Professor LaFave who states:

> It is less than apparent, however, that the fact a kit contains burglar tools can often "be inferred" from its "outside appearance." LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 1980, Vol. 2, p. 39, n. 102.2.

They are much more like the containers in Arkansas v. Sanders and United States v. Chadwick than they are containers whose contents are graphically disclosed by outer appearances. The contents were not tantamount to being in plain view. There was no waiver of a Fourth Amendment right. On the contrary, the State of California concedes that petition had an expectation of privacy in the packages. (Opposition to Petition for Writ of Certiorari, at 10)

As to the "nature" of the container employed, we deal with a package which "presents the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes." (Opinion of Justice Rattigan, Petition for Writ of Certiorari, p. A-11). The package bore no legend or other written indicia supporting any inferences regarding its contents. The "nature" of the package was no different than the

nature of any other plainly wrapped, rectangular-shaped package routinely shipped by mail. The nature of the package was such that the contents could not be known while the package remained tightly wrapped and sealed closed.

Any estimate as to what is in a package of this type is no more than a hunch. Officer DePue did not make such a guess, but even assuming he could or did, the policy of the warrant clause is "that those inferences be drawn by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 13-14.

C. One Who Safeguards His Personal Possessions Is Due The Protection Of The Fourth Amendment

These conclusions are confirmed by the history of decisions of this Court which have extended the Fourth Amendment guarantee to whosoever securely safeguards his personal possessions. Certainly petitioner

protected the privacy of his possessions far more adequately than the leaking footlocker shipped by train in United States v. Chadwick, supra. As to the facts in that case, the court declared:

> No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment. 433 U.S. 1, at 11.

A securely wrapped package is the standard measure of the right of our people to be secure against unreasonable searches and seizures of their papers and effects. United States v. Chadwick, supra, quotes the following from the venerable precedent of Ex parte Jackson, 96 U.S. 727, 733:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and an inspection, except as to their outward form and weight as if they were retained by the parties. The constitutional guarantee of the right of the People to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed

> against inspection wherever they may be. U.S. v. Chadwick, 433 U.S. at 10.

Sealed packages were again accorded the full protection of the warrant clause of the Fourth Amendment in United States v. van Leeuwen, 397 U.S. 249 (1970). See also United States v. Phillips, 478 F.2d 743 (5th Cir. 1973).

Certainly the sealed packages in this case could not be included in the category of containers which "by their very nature cannot support any reasonable expectation of privacy" without doing violence to the principles of Jackson and van Leeuwen. Indeed, the holding of Ex parte Jackson merely extends to the mails the rights of privacy which would exist if the letters and sealed packages "were retained by the parties." 96 U.S. at 733.

The holding of Arkansas v. Sanders makes it clear that finding luggage or packages in automobiles is not different than find-

ing them any other place. Thus, if the police had been invited into petitioner's home for the purpose of discussing with him the purchase of raffle tickets and while there viewed securely wrapped and sealed plain packages which could have contained bricks of marijuana, they would have had no right to seize and search those packages without a warrant absent emergency conditions.

D. Exceptions To The Warrant Clause Must Be Few And Rigorously Circumscribed

The search of the packages in this case required a warrant unless the Court is willing to create some new exception to the warrant clause. Exceptions can be established to the warrant requirement since the public interest requires some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search. A number of well established

principles control the recognition of such exceptions.

1. These exceptions are "few" and "jealously and carefully drawn." Jones v. United States, 357 U.S. 493, 499 (1958).

2. Exceptions are allowed in those cases where the societal costs of obtaining a warrant such as danger to law officers or the risk of loss or destruction of evidence outweigh the reasons for prior recourse to a neutral magistrate. United States v. United States District Court, 407 U.S. 297, 318 (1972).

3. Since every exception impinges to some extent upon the protective purpose of the Fourth Amendment, "the burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1952).

4. The reach of each exception will be limited to that which is necessary to accomodate the identified needs of society.

Mincie v. Arizona, 437 U.S. 385, 393 (1978).

The search in this case cannot satisfy these standards. There are no identified needs of siciety comparable to the needs posed by the risk of guns or the risk of destruction of evidence which require the suspension of the warrant clause for parcels of almost any size or weight which are shipped in almost any common wrapping material. Arkansas v. Sanders, 442 U.S. 753. On the contrary, parcels of this type are the traditional business of the warrant clause. Ex parte Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970).

III

THE MANDATE OF THIS COURT WAS VIOLATED WHEN THE STATE COURT REINSTATED ITS JUDGMENT ON NEW GROUNDS NOT ENCOMPASSED WITHIN ITS PRIOR JUDGMENT

The May 9, 1978 decision of the California Court of Appeal upheld the warrantless search on one ground only, "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at iv, App. to Petition For A Writ of Certiorari, Robbins v. State of California, No. 78-567). The State of California had not contended in that court, or prior thereto, that the contents of the packages were in plain view or could be inferred from the outward appearance of the packages.

Inasmuch as neither the State of California nor the California Court of Appeal had raised this issue, petitioner did not raise this issue in his Petition for Writ of Certiorari to this Court dated September 29, 1978. On June 25, 1979 this Court granted

the Petition, ordered the judgment of the Court of Appeal be vacated and remanded the case to the Court of Appeal for further consideration in light of Arkansas v. Sanders, supra.

Had the new grounds now urged been previously raised or decided upon, petitioner might have filed a different petition to this Court, the review by this Court might have been different, a different mandate might have been issued, or no mandate at all might have issued.

But this was not the case. The review of this Court was directed to a decision of the California Court of Appeal which did not encompass a claim that the contents of the packages were in plain view or could be inferred from the outer appearance of the package. Petitioner submits that this should settle that issue forever. Any other result undermines the authority of this Court to finally settle federal questions.

The California Court of Appeal could not consider the new grounds simply because these grounds were mentioned in footnote 13 of Arkansas v. Sanders. In its efforts to provide a comprehensive and scholarly map of the Fourth Amendment, Arkansas v. Sanders discusses all the exceptions to the warrant clause, including the exigent circumstances exception and the search incident to arrest exception. 442 U.S. at 759, 760, 763, n. 11. Neither the grounds mentioned in footnote 13 nor any of the other exceptions to the warrant clause were encompassed within the prior decision of the California Court of Appeal. The California Court of Appeal could no more reinstate its judgment on the basis of footnote 13 than it could reinstate its judgment on any other new ground. To hold otherwise would permit the Court of Appeal upon a second reversal and remand to reinstate its judgment on some further new

ground not presently encompassed in their most recent decision.

In N.A.A.C.P. v. Alabama, 360 U.S. 240 (1959), where an Alabama court had adjudged the N.A.A.C.P. in contempt for failure to disclose its membership list, this Court dealt with this type of problem. In the Court's original opinion it decided the issue raised by the briefs and the record, i.e., "whether the refusal of the N.A.A.C.P. to produce names and addresses of its Alabama members was protected by the Fourteenth Amendment's interdiction against state interference with First Amendment rights?" Id. at 243, n. 3. No claim had been made by the State of Alabama, or decided upon by the Alabama Supreme Court that the contempt order was founded upon any other ground except the failure to disclose membership lists. "And that was the premise on which the Court disposed of the case." 360 U.S. at 243.

Nonetheless, after the Court remanded the case to the Alabama Supreme Court, that court reinstated its decision on new grounds, to wit: that the N.A.A.C.P. had been adjudged in the contempt for failing to produce other documents aside from the membership lists.

This Court held that the Alabama Supreme Court could not ignore the premises upon which this Court's decision rested. Quoting from Sibbold v. United States, 12 Pet. 488, 492, this Court held:

> Whatever was before the Court, and is disposed of, is considered finally settled. N.A.A.C.P. v. Alabama, 360 U.S. at 244-245.

Under Art. II of the Constitution, this Court's jurisdiction is limited to actual "cases and controversies." A decision of remand which nullifies this Court's decision on new grounds has the net effect of holding that there was no real case or controversy in this Court.

Admittedly, lower courts have sometimes succeeded in evading the mandate of this Court by reinstating their decision on new state grounds. See, e.g., Davis v. Packwood, 8 Pet. 312 (1834); Note, 55 Harv.L. Rev. 1357 (1942); Note, 67 Harv.L.Rev. 1251 (1954); Note, 95 U.Pa.L.Rev. 764 (1947); Note, 56 Yale L.J. 574, 580 (1947); Note, 50 Geo.L.J. 819. This is because the traditional function of this Court in review of state court decisions is to decide the federal issues and then send the case back to the state court to render final judgment. See, e.g., Murdock v. Memphis, 20 Wall. 590, 636 (1875); see generally, Note, 55 Harv. L.Rev. 1357 (1942).

Some believe that when this policy of judicial restraint permits evasion of this Court's mandate, our country's judicial system is discredited. See, e.g., 56 Yale L.J. 574, 580 (1947). Nonetheless, it is recognized that the policy applies only to new

state grounds, and does not permit a state court to evade this Court's mandate by re-instating its judgment on new federal grounds which were not previously raised or considered. See generally, Note, 67 Harv.L.Rev. 1251, 1257 (1954); Note, 50 Geo.L.J. 819, 848 at n. 213.

Mandates of the type involved in this case account for a substantial portion of this Court's workload. To the extent possible the decisions and rules of this Court should articulate the scope of such a mandate. As Roger Traynor, the former Chief Justice of the California Supreme Court has stated:

> In its pre-occupation with substantive problems an appellate court sometimes loses sight of the importance of the procedural rules for determining what errors will be reviewed and how a case will be disposed of if the judgment below proves erroneous. Certainly the court's rules should enable it to settle as much of the dispute as possible on one appeal.
> Some Open Questions on the Work of State Appellate Courts, 24 U.Chi.L.Rev. 221-222 (1957)

This policy assumes special importance for appeals in criminal cases where justice should be both swift and sure, and public outcries are heard that multiple appeals on procedural grounds tax the ability of the system to function properly. It is therefore fortunate that even though it may not be possible for this Court to articulate a rule which applies to all types of civil and criminal cases, it is possible to recognize a rule which applies to procedural objections in search and seizure cases. When objections are made to a search, there exists a discrete number of federal grounds for objections and a discrete number of federal grounds for supporting the search and seizure. Thus, for example, where a warrantless search has occurred, only a few exceptions to the warrant clause are recognized. There is absolutely no reason why all objections by the defendant and defenses by the state cannot be raised prior to the

time for the filing of the petition for writ of certiorari in this Court.

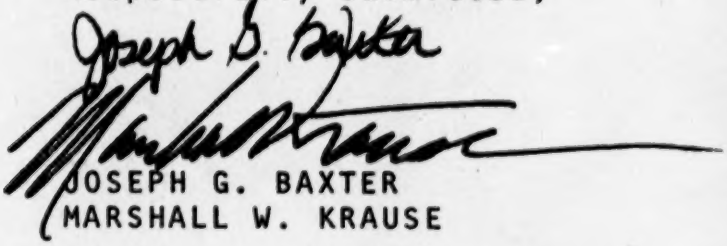
Petitioner submits that unless the mandate of this Court on remand specifically authorizes the state court to consider new federal grounds, see, e.g., McGoldrick v. Berwind-White Co., 309 U.S. 33, 59 (1940), federal grounds not previously raised may not be used to reinstate a state court judgment reversed by this Court on a search and seizure issue. Such a rule applies equally to the prosecution and the defense. Any other rule permits a state court to make the review process of this Court a waste of time for both the Court and the petitioner. Any other rule permits state courts to unseat the authority of this Court to finally settle federal questions.

CONCLUSION

For all the reasons mentioned, petitioner respectfully requests that the judgment of the California Court of Appeal be vacated and reversed.

Dated: March 5, 1981

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, in which county the within mentioned mailing occurred, and not a party to the subject cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On March 12, 1981 I served the within Brief for Petitioner on the respondent to said action by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Larkspur, California, addressed as follows:

Attorney General of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 1981, at Larkspur, California.